IN THE SUPREME COURT OF MISSISSIPPI

NO. 95-M-01240-SCT

PAUL L. BARRETT

v.

STATE OF MISSISSIPPI

ATTORNEYS FOR APPELLANT:	JOHN M. COLETTE
	JOHN R. COUNTISS, III
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: JOHN H. EMFINGER
	LEE MARTIN
DISPOSITION:	STAY DISSOLVED - 3/14/96
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

ORDER

¶1. This matter comes before the Court, sitting *en banc,* on the State's request for reconsideration and supplemental response to emergency motion of appellant for stay of execution of judgment pending appeal and for approval of terms and conditions of stay and Appellant's motion to strike State's request for reconsideration and supplemental response to the emergency motion of appellant. The Court finds that the motions should be denied. The Court on its own motion dissolves the stay entered in this cause on December 14, 1995.

¶2. IT IS THEREFORE ORDERED that the State's request for reconsideration and supplemental response to emergency motion of appellant for stay of execution of judgment pending appeal and for approval of terms and conditions of stay is denied. Appellant's motion to strike State's request for reconsideration and supplemental response to the emergency motion of appellant is denied. The stay entered in this cause on December 14, 1995 by the Court is hereby dissolved.

¶3. SO ORDERED.

FOR THE COURT

/s/ Lenore L. Prather

Lenore L. Prather

Presiding Justice

On State's Motion to reconsider: DAN M. LEE, C.J., PRATHER, SULLIVAN, P.JJ., and BANKS, McRAE, ROBERTS and MILLS, JJ., would deny; PITTMAN and SMITH, JJ., would grant. On Appellant's motion to strike: DAN M. LEE, C.J., and McRAE, J., would grant. On dissolving stay: DAN M. LEE, C.J., and BANKS and McRAE, JJ., dissent.

McRAE, Justice, Statement on Order:

¶4. Because M.R.A.P. 40 makes no provision for the rehearing or reconsideration of orders entered on motions and because the Attorney General's Office has so thoroughly failed to follow our rules and procedures, I disagree with the majority's decision to, in effect, grant the State's motion to reconsider our December 14, 1995 en banc order and vacate our stay of the circuit court's order to remove Sheriff Barrett from office. Six justices, after reading the order as published in the appendix, voted to enter that order as written.(1) The majority, in its rush to oblige, now vacates our order and reinstates the circuit court's order, effectively throwing out the requirement that a final judgment of conviction is required to remove a public official from office. *Bucklew v. State*, 192 So.2d 275 (Miss.1966). However, once the State's motion to reconsider was denied by a vote of 7-2, the matter should have ended since there was nothing else before us to consider. Gamesmanship got the upper hand, leading the majority, on its own motion, to dissolve the stay entered on December 14, 1995, thereby saying that it is not even necessary to have a final, certified copy of a foreign judgment. Since the majority's "knee jerk" reactions to these improperly filed motions have made this Court appear inconsistent, I dissent.

¶5. The Office of the Attorney General, which provides legal counsel for all State offices, is charged with the same responsibility as any public defender, district attorney or private attorney. In this case, the State has not been served well; rather, its attorneys have tread on thin ice, providing less than effective assistance of counsel in a series of legal maneuvers that have sent this Court reeling. To begin with, the State filed its Motion for Removal from Office in the Warren County Circuit Court on October 24, 1995, without first obtaining a certified copy of a final judgment of conviction. On December 13, 1995, the State filed in this Court its Response to Emergency Motion of Appellant for Stay of Execution of Judgment Pending Appeal and for Approval of Terms and Conditions of Stay. To further compound its error, though, it apparently did so without first making inquiry into whether the United States District Court for the District of Columbia had ruled on Barrett's post-trial motions. As a court of appeals, this Court cannot rule on evidence not put before it in the record. *Mississippi Constitution of 1890,* art. 6, sec. 146. Thus, it was incumbent upon the State, and not this Court, to have made inquiry into the status of Barrett's post-trial motions *before* filing its responsive pleadings to his motion for stay. The failure of Attorney General's Office to keep timely abreast of the District Court's actions and properly inform us of orders entered in this highly-publicized case has resulted in a series of knee-jerk decisions by this Court, which have kept us from other pressing matters long awaiting our attention. Apparently, we now require only a guilty verdict and not a final judgment or conviction to remove an official from office.

¶6. The Attorney General's Office further has fallen short of its responsibility by filing an inappropriate and procedurally incorrect motion, to wit: the December 15, 1995 Request for Reconsideration and Supplemental Response to Emergency Motion of Appellant for Stay of Execution of Judgment Pending Appeal and for Approval of Terms and Conditions of Stay. Obviously, this Court does not entertain petitions for rehearing on motions. "Petitions for rehearing are limited to cases on the merits." Comment, M.R.A.P. 40 (1995). Therefore, reconsideration of the order granting Barrett's motion for stay would not be appropriate. Although the majority has denied the motion to reconsider, on what basis does the majority

withdraw the order? Nothing new has been properly presented to this Court since our order was entered. We denied the State's motion to reconsider, leaving nothing before us since the December 14, 1995 order. The State is claiming that the facts at the time that it originally filed its motion with this Court have changed. M.R.A.P. 40 provides that a petition for rehearing is "used to call attention to specific errors of law or fact which the opinion is thought to contain." Based on the original record presented to this Court, the State fails to point to any error in law or fact. Instead, the majority accepts new evidence for the first time without it having been presented in the court below. This Court is an appellate court, and not a court of original jurisdiction. *Mississippi Constitution of 1890,* art. 6, sec. 146; *see State v. Keeton,* 176 Miss. 590, 169 So. 760 (1936); *White v. State,* 159 Miss. 207, 131 So. 96 (1930). We do not have the "power to alter, amend or correct the records of trial courts in respect to the contents or recitals of those records." *Brown v. Sutton,* 158 Miss. 78, 121 So. 835, 837 (1929). The power to amend a record does not fall within the powers given this Court incidental to carrying out its appellate function. *Id.*

¶7. This Court initially denied the State's motion to remove Sheriff Barrett on the grounds that the motion was prematurely filed. In addition, although this Court does not have jurisdiction to review the "new evidence" presented in this case, a lower court likewise would be prevented where the State has failed to produce a certified copy of a ruling on Barrett's motion for a new trial as was required by the order entered just days ago by this Court.

¶8. At best, today's decision affects only the last two weeks of the term of office Barrett is currently serving. In *Cumbest v. Commissioners of Election,* 416 So.2d 683 (Miss.1982), where a former supervisor was removed from office after his conviction for committing fraud in public office, we held that his right to hold that office was extinguished "for the remainder of the term to which he was elected." *Id.* at 689.[(2)] Thus, the removal of Barrett from office prior to the entry of a final judgment in his case is valid only from the date of the order removing him from office through the end of his present term--December 31, 1995. The new term to which he was elected in November, 1995, which begins on January 1, 1996, the first Monday of the January following the election pursuant to Miss.Code Ann. § 25-1-5, is not affected by the majority decision today.

¶9. Miss.Code Ann. § 25-5-1, under which the Attorney General seeks to remove Barrett from office, contains no language forever barring an official from holding office if "convicted" or "found guilty" of a crime. To the contrary, it provides merely for "removal from office," (referring to that term of office only). Section 25-5-1 provides as follows:

> If any public officer, state, district, county or municipal, shall be convicted in any court of this state or any other state or in any federal court of any felony other than manslaughter ... any court of this state, in addition to such other punishment as may be prescribed, shall adjudge the defendant removed from office; and the office of the defendant shall thereby become vacant....
>
> When any such officer is found guilty of a crime which is a felony under the laws of this state or which is punishable by imprisonment for one (1) year or more, other than manslaughter or any violation of the United States Internal Revenue code, in a federal court or a court of competent jurisdiction of any other state, the Attorney General of the State of Mississippi shall promptly enter a motion for removal from office in the circuit court of Hinds County in the case of a state officer, and in the circuit court of the county of residence in the case of a district, county or municipal officer. The court, or the judge in vacation, shall, upon notice and a proper hearing, issue an order removing such person from office

and the vacancy shall be filled as provided by law.

¶10. Because § 25-5-1 is penal in nature and leaves the official whose removal is sought with no recourse or remedy, it must be construed in his favor. *See Smith v. Dorsey,* 599 So.2d 529 (Miss.1991); *Commercial National Bank v. Fleetwood Homes of Mississippi,* 398 So.2d 659, 661 (Miss.1981). Consequently, reading the statute together with *Cumbest,* it is apparent that our power to remove Sheriff Barrett is limited to his present term of office. Whatever our actions today, nothing in § 25-5-1 prevents Barrett from beginning his new term as sheriff on January 1, 1996. Ironically, while his conviction for perjury in federal court may serve to remove him from his present term of office, since it is not final, it should not disqualify him from beginning his new term. *State ex rel. Muirhead v. State Board of Election Commissioners,* 259 So.2d 698 (Miss.1972) (federal conviction no bar to holding seat in State Senate despite *Mississippi Constitution of 1890,* art. 4, § 44); *State ex rel. Mitchell v. McDonald,* 164 Miss. 405, 145 So. 508 (1933) (guilty plea to perjury charges in federal court did not disqualify official from holding county office). *But see Mississippi Constitution of 1890,* art. 4, § 44(2) (as amended 1992) (person convicted of felony in federal court cannot hold "any office of profit or trust"); Miss.Code Ann. § 99-19-35 (person convicted of perjury cannot practice medicine, dentistry "or be appointed to hold or perform the duties of any office of profit, trust, or honor, unless after full pardon for the same").

¶11. The Attorney General's offices are located on the fifth floor of the Gartin Justice Building; the Supreme Court is housed just one floor below. The events of the past week have illustrated the wisdom of this arrangement since, clearly, someone is above the laws and rules of this Court. The majority has elected to consider "new evidence." However, without a certified copy of the District Court's order, there is nothing new to consider. Instead, the majority makes new law, allowing an official to be removed from office without a final judgment or proof thereof. Accordingly, I dissent.

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 95-M-01240-SCT

Paul L. Barrett

v.

State of Mississippi

ORDER

This matter came before the Court on Barrett's Emergency Motion of Appellant for Stay of Execution of Judgment Pending Appeal and for Approval of Terms and Conditions of Stay. By order dated December 12, 1995, this Court stayed any order of the circuit court removing Barrett from office until 2:00 p.m., December 13, 1995, and by order dated December 13, 1995, this Court further stayed the order of the circuit court removing Barrett from office until 2:00 p.m., December 15, 1995.

The Court finds that because no final judgment has been entered "convicting" Sheriff Barrett of any wrongdoing, the circuit court's order removing Barrett from office is premature. The Court further finds that the order entered by the circuit court removing Barrett from office must be stayed until the post-trial motions

filed in his case have been disposed of by the United States District Court for the District of Columbia.

" [N]othing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word 'conviction.' " *Murphree v. Hudnall,* 278 So.2d 427, 428 (Miss.1973), *citing City of Boston v. Santosuosso,* 307 Mass. 302, 30 N.E.2d 278 (1940). An order which merely states that an individual has been found guilty does not qualify as a final judgment. *Murphree,* 278 So.2d at 428; *see Mississippi Bar v. Attorney G,* 630 So.2d 344, 348 (Miss.1994) (plea of guilty does not qualify as "conviction"); *see also Keithler v. State,* 18 Miss. (10 Sm. & M.) 192, 236 (1848) ("we cannot doubt but what the legislature used the word "conviction" in its broadest sense, as one under judgment").[(3)] Nor will this Court accept jurisdiction over an appeal in this State until the post-trial motion for a new trial has been resolved. Miss.R.App.Pro.Rules 4(d)-(e); *Beckwith v. State,* 615 So.2d 1134, 1142 (Miss.1992); *Cotton v. Veterans Cab Co.,* 344 So.2d 730, 731 (Miss.1977).

In *Bucklew v. State,* 192 So.2d 275 (Miss.1966), a public official was found guilty of attempted embezzlement of city funds. This Court determined that he properly was removed from office only because a judgment of conviction had been entered and a motion for new trial denied in the matter. *Id.* In the case at hand, the State has failed to offer a certified copy of the judgment, as there has been no final judgment of conviction entered against Barrett. His motion for judgment of acquittal or in the alternative, for a new trial, is currently pending before the United States District Court for the District of Columbia. There can be no final judgment entered in that matter without a ruling on that motion, and no "conviction" exists where the court has yet to enter an order of final judgment. Accordingly, there must be an entry of judgment to establish a conviction before Barrett may be removed from office, and there can be no conviction at least until the post-trial motions in this matter are resolved.

THEREFORE, IT IS ORDERED that the stay entered by this Court on December 13, 1995 be, and hereby is extended until further order of this Court. The order entered by the circuit court removing Barrett from office is hereby stayed until further order of this Court. Opinions will follow.

SO ORDERED, this the 14th day of December, 1995.

/s/ Chuck R. McRae

FOR THE COURT

LEE, C.J., PRATHER, P.J., and BANKS, McRAE, ROBERTS and SMITH, JJ., concur. SULLIVAN, P.J., and PITTMAN and MILLS, JJ., dissent.

BANKS, Justice, dissenting:

¶12. In my view, the operative event for removal of a public official from office under the provisions of Miss.Code Ann. § 25-5-1 (1972) is conviction. As will be shown below, that event does not ordinarily occur until sentence is imposed under the settled law of this state and that of the vast majority of our sister states. Certainly, in my view, the least that is required is a formal affirmation of a verdict by ruling adversely on post-trial motions asking the trial court not to accept the verdict. It is based on these views that I joined in the order issued staying the judgment of the Warren County Circuit Court removing the petitioner from

office at a time when that court had no more before it than an acknowledgment that a federal trial court had announced a verdict of guilty, when no adjudication had been entered, no sentence had been imposed and when a post-trial motion for judgment of acquittal or in the alternative a new trial was still pending before the federal trial court.

¶13. The order entered on December 19, 1995 dissolves that stay based on information supplied to this Court that the federal trial court has formally rejected the post-trial motion. I did not join that order and I now write to fully express my views with regard to the issue presented.

¶14. I did not join the second order on procedural grounds, in part. I believe that the matter should have been remanded to the circuit court where the new evidence regarding the finality of conviction could have been presented and ruled upon. I would not have stopped there, however, because I believe that we should make a definitive statement as to when a public officer may be removed from office under the statute. That is, I believe that we must say whether a "conviction" is necessary and whether finality in the trial court is necessary to a "conviction." I would answer both questions in the affirmative.

I.

¶15. It cannot be seriously disputed that our precedents place this state in line with the vast majority of American jurisdictions, that a "conviction," as that term is used in provisions which affect the rights of individuals, refers to a final adjudication in a criminal trial court. *Murphree v. Hudnall,* 278 So.2d 427, 428 (Miss.1973); *State v. Henderson,* 166 Miss. 530, 146 So. 456 (1933); *Helena Rubenstein Int'l v. Younger,* 71 Cal.App.3d 406, 139 Cal.Rptr. 473 (1977); *Slawik v. Folsom,* 410 A.2d 512 (Del.1979); *Summerour v. Cartrett,* 220 Ga. 31, 136 S.E.2d 724 (1964); *Grogan v. Lisinski,* 113 Ill.App.3d 276, 68 Ill.Dec. 854, 446 N.E.2d 1251 (1983); *Keogh v. Wagner,* 20 App.Div.2d 380, 247 N.Y.S.2d 269 (1964), *aff'd,* 15 N.Y.2d 569, 254 N.Y.S.2d 833, 203 N.E.2d 298 (1964); *Vasquez v. Courtney,* 272 Or. 477, 537 P.2d 536 (1975); *Shields v. Westmoreland County,* 253 Pa. 271, 98 A. 572 (1916); *Eckels v. Gist,* 743 S.W.2d 330 (Tex.App.1987); *Smith v. Commonwealth,* 134 Va. 589, 113 S.E. 707 (1922); *Kitsap County Republican Central Committee v. Huff,* 94 Wash.2d 802, 620 P.2d 986 (1980). The reason for this view has been explained with reference to the strict construction usually accorded penal statutes, but the competing values have also been analyzed.

> Sound public policy, too, requires [waiting until entry of judgment]. While a public official found guilty of a prohibited act should not be permitted to continue in office too long thereafter (such as the months and years often required for the appellate process), because of the vital need for the public's trust and confidence in public officers, it is also important that a public officer, especially one elected by the people, not be permanently removed from office under [Delaware's constitutional provision regarding removal] with undue haste, before he has had his full and complete "day in court." That time comes with imposition of the sentence of the Court after guilt has been found.

Slawik v. Folsom, 410 A.2d at 518; Accord, *Kitsap County Republican Central Committee v. Huff,* 620 P.2d at 989-990.

¶16. It is, of course, distasteful to have one thought probably guilty of a serious offense, based upon the findings of twelve or some number of citizens of another jurisdiction or of a judicial officer there, to continue to hold public office in this state. There are competing values, however. One such value is that one put in office by the electorate should not be hastily removed. *See, Lizano v. City of Pass Christian,* 96 Miss.

640, 645, 50 So. 981 (1910) (quoted below). There is still another value which is time honored and suggests that individuals are entitled to their "full day in court" at least through the completion of the trial court process. *Slawik v. Folsom,* 410 A.2d at 518. We have mechanisms in this state, mirrored by those in other jurisdictions, which allow trial courts ample opportunity to correct their own mistakes. Only after that process is complete should we accord the presumption of correctness to proceedings. This especially is so where we engage in a collateral action on the basis of the result of those proceedings.

II.

¶17. It is suggested that the statute here in question should be interpreted to allow removal upon the rendering of a verdict. What is seized upon for that interpretation is the statutory command that the Attorney General file an action seeking removal of one "found guilty" in the court of another state or a federal court. Miss.Code Ann. § 25-5-1(1972). That paragraph provides that, in such proceedings, after notice and a hearing the public official may be removed. I disagree with that interpretation of the statute for a number of reasons.

¶18. First, that interpretation is inconsistent with the constitutionally required title of the legislation which enacted it. *Lewis v. Simpson,* 176 Miss. 123, 167 So. 780 (1936) (the title of an act may be resorted to to relieve any ambiguity in the body of the act). The title of Senate Bill 2426 and the act which it generated describes its purpose as providing for the removal of persons "convicted" in federal and state courts. 1979 Miss.Laws 508. There is no suggestion that the purpose of this bill was to do anything other than add "conviction" of crimes in other jurisdictions to grounds for removal and to provide a mechanism for bringing the fact of conviction in another jurisdiction before a court in this State for implementation of the stated policy of removing persons so convicted. The provision for a hearing is meaningless absent an affirmative grant of power to remove upon the finding of some fact prerequisite to removal. The fact prerequisite to removal is found, not in the paragraph compelling the Attorney General to file the motion but, in the former paragraph compelling the court to remove one "convicted" as there indicated. This interpretation of the statute is not at odds with the authority of the Attorney General to initiate proceedings prior to the finality of a judgment of conviction. Actual removal is all that must be stayed until the judgment of conviction is entered.

¶19. Secondly, the words "found guilty" are also fraught with ambiguity. Found guilty by whom is one question. It has been asserted and rejected that a finding of guilt of the proscribed conduct by a civil jury or a court in *quo warranto* proceedings is sufficient. *State v. Henderson.* Whether the "finding" is interlocutory or final is another. We deal with a highly penal statute. The rule of construction is that it should be construed strictly against those who would seek to impose the sanction prescribed. *Merritt v. Magnolia Federal Bank For Savings,* 582 So.2d 420 (Miss.1991); *Bailey v. Georgia Cotton Goods Co.,* 543 So.2d 180 (Miss.1989).

¶20. Thirdly, seizing on these words and giving them a different interpretation gives greater credence and effect to foreign verdicts than those of our own fact finders and, in most instances, more than those jurisdictions would give them. The statutory directive to the Attorney General to act is limited to convictions in courts of other states or federal court. Miss.Code Ann. § 25-5-1 (1972).[(4)] It might be argued, in support of the proffered construction, that in some other jurisdiction there may be an unreasonable delay in bringing a conviction to finality but there is nothing to suggest that a jurisdiction which brings the prosecution in the first place would have any interest in delaying the proceeding for any reason other than to that which is

just under the circumstances. Should foreign jurisdiction post verdict delay become a problem, the legislature has shown itself capable of dealing with it.

¶21. Finally, and most important, however, this Court has observed that a statutory provision for removal on the basis of something other than a conviction would offend our constitution. *Lizano v. City of Pass Christian,* 96 Miss. 640, 645, 50 So. 981 (1910); *State v. Henderson,* 166 Miss. 530, 537, 146 So. 456 (1933). In every constitutional and statutory provision providing for or affecting the removal or disqualification of public officials that the writer has found conviction is required. Miss. Const. Sec. 44; Miss. Const. Sec. 175; Miss. Const. 241. As indicated above, that word has been given a consistent meaning in this and other states when used in the context of disqualification or removal of elected officials.

> It should be a serious thing to remove from office, before the expiration of his term, any officer whom the people have selected to govern them. It was designed by the constitution to make it a serious thing. Unless there is immediate and serious cause, the ballot is intended to be the method of removal, and it was not the purpose of the constitution makers that the will of the people should be thwarted by partisans, but that removals should only be made by calm judicial investigation, and *only after conviction.* This method is safe, and should and must be pursued as the constitution requires.

96 Miss. at 646, 50 So. 981 (emphasis supplied).

¶22. For the foregoing reasons, I would have remanded this matter to the circuit court of Warren County with instructions to hold the matter before it in abeyance pending imposition of sentence in the Federal District Court for the District of Columbia.

DAN M. LEE, C.J., joins this opinion.

1. See Appendix A.

2. Cumbest did not seek re-election. However, this Court held that he did not have standing to stay the election filling the remainder of his term.

3. This Court also has interpreted the word "conviction" to require a sentence in addition to judgment. *Lang v. State,* 238 Miss. 677, 680, 119 So.2d 608 (1960). However, it is suggested only that the post-trial motions be resolved before there exists a "conviction."

4. This is a point apparently overlooked in the proceedings in *Gerrard v. State,* 619 So.2d 212 (Miss.1993).